(7)

No. 91-469

FILED
OCT 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONER'S REPLY BRIEF

ROBERT S. LEMLE
MARTI GREEN
CABLEVISION SYSTEMS CORPORATION
One Media Crossways
Woodbury, New York 11797
(516) 496-1212

BRUCE D. SOKLER *
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 293-0500
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE ANTITRUST QUESTIONS WARRANT PLENARY REVIEW	2
II. THE FIRST AMENDMENT WAIVER QUESTION WARRANTS PLENARY REVIEW	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976)	3
Allright Colorado, Inc. v. City and County of Denver, 937 F.2d 1502 (10th Cir. 1991), *petition for cert. filed*, No. 91-572 (Sept. 30, 1991)	3
Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 843 F.2d 1154 (8th Cir. 1988)	5
City of Columbia v. Omni Outdoor Advertising, Inc., —— U.S. ——, 111 S. Ct. 1344 (1991)	2, 3
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	2, 3
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986)	8
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	2
Conley v. Gibson, 355 U.S. 41 (1957)	5
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	7
FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991)	4
H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531 (8th Cir. 1989)	6
H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d 1005 (2d Cir. 1989)	5-6
Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989)	6
Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories, 460 U.S. 150 (1983)	3
Lorain Journal Co. v. United States, 342 U.S. 143 (1951)	5
Parker v. Brown, 317 U.S. 341 (1943)	2, 3
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962)	5
Radovich v. National Football League, 352 U.S. 445 (1957)	5
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	3
Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982)	5

TABLE OF AUTHORITIES—Continued

Page

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 2, 4
Union Pacific R.R. Co. v. United States, 313 U.S. 450 (1941) 3
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 5

Constitutional Provisions, Statutes, and Rules:

U.S. Const. Amend. I ..... *passim*
15 U.S.C. § 26 (1988) 5
15 U.S.C. §§ 34-36 (1988) 5
47 U.S.C. § 521(6) (1988) 4
47 U.S.C. § 541(b) (1988) 6
Fed. R. Civ. P. 15 6

Other Authorities:

In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962 (July 31, 1990) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-469

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONER'S REPLY BRIEF

Petitioner Paragould Cablevision, Inc. ("Cablevision") submits this reply brief in support of its Petition for a Writ of Certiorari. In its Petition, Cablevision set forth important and recurring questions regarding the anti-trust exemption for municipally-owned competitors and regarding the standards for waivers of First Amendment rights in franchising contexts. The troubling implications and precedental impact of the Eighth Circuit's opinion were underscored and analyzed by the three briefs *amicus curiae* filed in support of the petition.[1] The basic

---

[1] Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* for the National Cable Television Association, Inc. in Support of Petitioner ("NCTA Br."); Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of Tele-Communications, Inc., United Artists Entertainment Co., Storer Communications, Inc., and Comcast Cable Communications, Inc. in Support of Petitioner ("TCI

thrust of the briefs in opposition [2] is to attempt, through hyperbole and mischaracterizations of Cablevision's claims and the court of appeals' ruling, to camouflage the Eighth Circuit's erroneous legal and policy positions. Once the underbrush strewn by respondents is swept away, what remains is a decision that presents questions of broad importance meriting review by this Court.

I. THE ANTITRUST QUESTIONS WARRANT PLENARY REVIEW

Starting with *City of Lafayette* in 1978, this Court has attempted to establish in four cases the extent to which municipalities should be provided antitrust immunity under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).[3] The Eighth Circuit's decision here highlights the necessity of the Court's squarely addressing the issue expressly left open last Term in *City of Columbia*—the immunity status of conduct by a municipally-owned marketplace competitor.

Cablevision and the amici supporting it contend that the federalism policies underlying the *Parker* doctrine would not be undermined, and the consumer welfare objectives underlying the antitrust laws would be advanced, by requiring government-owned market participants to

---

Br."); Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Warner Cable Communications, Inc. in Support of Petitioner ("Warner Br.").

[2] Brief in Opposition for Respondent City of Paragould (hereafter "City Br."); Brief in Opposition by Respondent Paragould Light and Water Commission (hereafter "CLW Br.").

[3] *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S. Ct. 1344 (1991).

comply with the same competitive safeguards as their competitors.[4]

From the perspective of federalism, the *Parker* state action doctrine was developed primarily to protect the actions of "States in their governmental capacities as sovereign regulators." *City of Columbia*, 111 S. Ct. at 1351. A government entity acting as a full marketplace competitor presents a very different situation. "It is thus a familiar concept that 'there is a constitutional line between the State as government and the State as trader.' " *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 696 (1976) (citation omitted). *See also Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (governmental-proprietary distinction for Commerce Clause analysis). To apply this distinction to municipally-owned enterprises, when municipalities hold no special place in our federal scheme, is particularly appropriate.

From the antitrust perspective, this Court recognized in *City of Lafayette* that unfettered economic choices by municipalities "counseled solely by their own parochial interests and without regard to their anticompetitive effects" could seriously damage the antitrust protection established by Congress. 435 U.S. at 408. Perhaps for such reasons, this Court has applied the Robinson-Patman Act to state proprietary activities, *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories*, 460 U.S. 150 (1983), and has applied the competitive protections of the Elkins Act to municipal proprietary conduct, *Union Pacific R.R. Co. v. United States*, 313 U.S. 450 (1941). To put it bluntly, it is equally appropriate to

---

[4] This case squarely presents the issue left open in *City of Columbia*, as it challenges the marketplace conduct of its municipal competitor, not the actions for antitrust purposes of the municipal government as sovereign. *Compare Allright Colorado, Inc. v. City and County of Denver*, 937 F.2d 1502 (10th Cir. 1991), *petition for cert. filed*, No. 91-572 (Sept. 30, 1991) (antitrust challenge to municipal regulations when city owned competing off-airport-shuttle parking services).

subject the conduct of CLW in Paragould to antitrust scrutiny as it is to test the conduct of nonprofit entities such as the Sisters of St. Joseph of Carondelet in Augusta, Georgia. *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

Amici NCTA proposes as a rule of decision that this Court should require express state authorization for anticompetitive practices engaged in by a municipal market participant. (NCTA Br. at 8.) Such a rule would certainly have prevented the Eighth Circuit's mistaken application of the standards found in *Town of Hallie* to conclude that in authorizing municipal entry into cable television the Arkansas legislature contemplated anticompetitive marketplace conduct by such entrants. That the court of appeals reached its ruling despite federal cable policy to promote competition in cable communications [5] and on the basis that the Arkansas legislature contemplated local governments ousting First Amendment speakers through anticompetitive means as a natural consequence of authorizing entry [6] further underscores the need for this Court to take action.

Respondent CLW insists that the court of appeals' decision is not so disturbingly broad and that the Eighth Circuit only upheld entry itself from antitrust scrutiny. (CLW Br. at 10-18.) Cablevision would like to believe that CLW is, in fact, right on this point, but CLW's argument is belied both by the court of appeals' holding —"the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies" (Pet. App. 6a)—and by its judgment. Cablevision's complaint was dismissed with prejudice, with no opportunity to amend.

---

[5] 47 U.S.C. § 521(6) (1988); *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (July 31, 1990).

[6] *See* Petition at 20-21.

Such a judgment is appropriate only if the court concludes "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *Baxley-DeLamar Monuments, Inc.* v. *American Cemetery Ass'n*, 843 F.2d 1154 (8th Cir. 1988). In contrast to CLW, according to the City of Paragould, the gist of the court's opinion is that "the Sherman Act simply has no application." (City Br. at 9.)

CLW also attempts to deflect Cablevision's petition by claiming that its Complaint was filed prematurely and was designed to crush, not preserve competition. (CLW Br. at 7, 17.) The fact of the matter is that under the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988), municipalities are immune from treble damage actions, remaining subject only to injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26 (1988). Under Section 16, injunctive relief is available where injury is merely threatened; it is not necessary that actual antitrust injury have already occurred. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) (antitrust plaintiff seeking injunctive relief "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur"); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1147 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982). Furthermore, an attempt to monopolize claim under section 2 of the Sherman Act does not require that monopolization of the market has already taken place. It is sufficient to allege that there is a dangerous probability of success in achieving prohibited anticompetitive effects. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951); *H.L.*

Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1017 (2d Cir. 1989); *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1540-41 (8th Cir. 1989); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir. 1989). For Cablevision to await further injury before initiating litigation might have permitted a court to conduct a thorough historical autopsy of how competition was eliminated, but left that court helpless to preserve consumer welfare or Cablevision as an independent competitor and First Amendment voice in Paragould.[7]

II. THE FIRST AMENDMENT WAIVER QUESTION WARRANTS PLENARY REVIEW

Under the Cable Act of 1984, a cable operator must apply for and obtain a franchise from the local franchise authority in order to provide cable service. 47 U.S.C. § 541(b) (1988). While recognizing that Cablevision had expressed a valid First Amendment claim because its franchise required it to solicit the City's permission to engage in commercial speech, the Eighth Circuit held that "Cablevision effectively bargained away some of its free speech rights" by entering into a franchise agreement. (Pet. App. 8a.) The three amici briefs provide eloquent testimony that the implications of this cavalier finding of waiver in the franchising context go far beyond the burdening of Cablevision's rights in Paragould and that the Eighth Circuit's decision is fundamentally inconsistent with this Court's jurisprudence.[8]

CLW's claim that Cablevision lost its right to challenge on constitutional grounds the advertising provision by

---

[7] Certainly if the Eighth Circuit were reversed, Cablevision would amend the complaint, pursuant to Fed. R. Civ. P. 15, to allege the predatory, anticompetitive and coercive conduct by the City and CLW that has been occurring, an opportunity that was denied by the court's judgment below.

[8] *See* NCTA Br. at 13-18; TCI Br. at 15-20; Warner Br. at 12-19.

failing to raise the objection at a proper time is absurd. CLW argues that any objections should have been raised at the time the contract was entered into. The case upon which CLW relies, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), concerned the failure to make a constitutional argument at a timely point in the litigation process, namely, at trial. It did not impose any duty to make constitutional objections outside a litigation context. Here, Cablevision has raised its First Amendment argument at every step in the litigation process, beginning with its Complaint. (CLW Br. App. 10a.) Hence, *Curtis* provides no support for CLW's position.[9]

Even if *Curtis* could be read to apply outside a litigation context, it still would not support CLW's claim that a mere failure to raise an objection waives it. *Curtis* held that a failure to object would amount to a waiver only if "clear and compelling" circumstances showed it to be a "knowing waiver." *Curtis*, 388 U.S. at 143-145. Applying this standard in *Curtis*, the Court found no waiver, even though the constitutional argument was not raised until after trial. *Id.* at 142-145. Under applicable law, the facts of each case must be carefully examined in order to determine whether or not a waiver of constitutional rights has taken place. (Pet. at 22.) CLW makes the same error as did the court of appeals by asserting waiver without any analysis.

As the amici make clear, the potentially far-reaching consequences of the court of appeals' decision on the cable industry are enormous. Under the logic of the court of appeals' decision, a municipality could require a cable operator to bargain away in the franchising process any

---

[9] In any event, Cablevision could not raise an objection to discriminatory tax treatment at the time the franchise was negotiated or signed as no other cable system operated in Paragould at that time. Contrary to CLW's assertion (CLW Br. at 19 n.15), only its revenues derived from the sale of cable services, and not advertising revenues, are included in CLW's franchise fees.

or all of its First Amendment rights recognized by the Court in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). Such a result is such a radical departure from this Court's jurisprudence that it should be reviewed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. LEMLE
MARTI GREEN
CABLEVISION SYSTEMS CORPORATION
One Media Crossways
Woodbury, New York 11797
(516) 496-1212

BRUCE D. SOKLER *
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 293-0500
Counsel for Petitioner

* Counsel of Record

October 25, 1991